

**Letter of Findings Number: 04-20120698**  
**Sales Tax**  
**For Tax Years 2009-11**

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**ISSUE**

**I. Sales Tax– Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-7; IC § 6-2.5-8-8; IC § 6-8.1-5-1; [45 IAC 2.2-4-33](#); [45 IAC 2.2-8-12](#).

Taxpayer protests the imposition of sales tax.

**STATEMENT OF FACTS**

Taxpayer is an Indiana business that conducts on-site auctions. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer failed to collect and remit sales tax for some items it auctioned during the years 2009-2011. The Department assessed sales tax for these transactions. Taxpayer protests a portion of the sales tax assessments. An administrative hearing was conducted and this Letter of Findings results. Further facts will be presented as required.

**I. Sales Tax– Imposition.**

**DISCUSSION**

Taxpayer protests the imposition of sales tax on certain transactions in which it participated as a retail merchant. The Department determined that Taxpayer should have collected sales tax on those transactions. Taxpayer argues that some of the sales in question were exempt and that one transaction was not a retail sale. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5.1(c).

First, the Department refers to IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

In addition, the Department refers to [45 IAC 2.2-4-33](#), which states:

Every person engaged in the business of making sales at auction of tangible personal property owned by such person or others, shall be and constitute a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute gross retail income of a retail merchant received from retail transactions.

(Emphasis added).

Further, the Department refers to [45 IAC 2.2-8-12](#), which states in relevant parts:

- (d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.

(Emphasis added).

Also of relevance is IC § 6-2.5-3-7, which provides:

- (a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption.
- (b) A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

(Emphasis added).

Also, IC § 6-2.5-8-8(a) states:

- (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

(Emphasis added).

Taxpayer has provided exemption certificates for some of the transactions that took place during the audited years. Some of the exemption certificates are Indiana exemption certificates, which are on the forms and in the manner prescribed by the Department, as required by IC § 6-2.5-3-7(b) and IC § 6-2.5-8-8(a). Therefore, sales to those customers will be removed from the Department's calculations of sales tax which should have been collected and remitted. However, some of the exemption certificates are from states other than Indiana and do not meet the requirements of IC § 6-2.5-3-7(b) and IC § 6-2.5-8-8(a) and therefore do not exempt items from Indiana state sales tax.

In addition, Taxpayer has provided documentation which supports its argument that it placed funds derived from a court-ordered deposit into an escrow account. Because these funds did not derive from a retail transaction of tangible personal property they are not subject to sales tax. Nevertheless, it is unclear whether the exempted items and the escrow funds were included in the assessment. It is therefore necessary for the Department's audit division to verify that the amount deposited in the escrow account was included in the Department's calculations of sales tax due. If the deposit in question was included in those calculations it will be removed.

The final category of protest is in regards to amounts rising from an auction which was conducted as tax exempt. Taxpayer treated it as exempt on the basis that the purchasers of the tangible personal property would need to pay sales tax at the time the property would be licensed. Taxpayer has not provided any documentation establishing that sales tax was actually paid by the purchasers or that the items in question were actually licensed. In the absence of supporting documentation, Taxpayer has not met the burden imposed under IC § 6-8.1-5-1(c).

In conclusion, Taxpayer has met the burden imposed by IC § 6-8.1-5-1(c) of proving the proposed assessments wrong regarding sales to Taxpayer's customers who provided Indiana sales tax exemption certificates. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c) regarding sales to customers who provided out-of-state exemption certificates. Taxpayer has established that the deposit into the escrow account was not a retail sale and was therefore not subject to sales tax. Taxpayer has not met the burden of proving the proposed assessments wrong regarding sales conducted at the auction and treated as exempt. The Department will conduct a supplemental audit to remove sales to those customers who provided Indiana exemption certificates. The supplemental audit will also verify that the amount deposited into the escrow account was included as a taxable sale and will remove that amount if it was included.

#### **FINDING**

Taxpayer's protest is sustained, in part, subject to verification by a supplemental audit.

*Posted: 08/28/2013 by Legislative Services Agency*

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